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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 85

STEPHEN L. KREZNAR and NOVERA H. SPECTOR,
Petitioners

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners Stephen L. Kreznar and Novera H. Spector pray that a writ of certiorari issue to review the Orders of the United States Court of Claims entered in *Kreznar* v. *United States* (No. 47-60) and *Spector* v. *United States* (No. 48-60) on June 22, 1962.

CITATION TO OPINION BELOW

The Court of Claims filed no opinion. The Order of the Court is reprinted in Appendix A, *infra*.

JURISDICTION

The Order of the Court of Claims was entered on June 22, 1962, and a timely motion for reargument and reconsideration was overruled on October 3, 1962. On December 28, 1962 Mr. Justice Brennan entered an order extending the time to file the petition for certiorari until March 1, 1963. This Court has jurisdiction under 28 U.S.C. § 1255.

QUESTIONS PRESENTED

1. Does this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, contemplate and direct that one deprived of a job by Defense Department officials, whose actions were found by this Court to be unauthorized, shall receive monetary restitution for back pay losses in accordance with applicable regulations (Par. 26, Dept. of Defense Directive 5220.6, 20 Fed. Reg. 1553, February 2, 1955) or the Fifth Amendment to the Constitution of the United States?

2. Was it proper for the Court of Claims to suspend, without reaching the merits, a suit for monetary restitution under the aforesaid 1955 regulation and the Fifth Amendment and to remit the plaintiff to further proceedings before the Department of Defense under DOD Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960?

CONSTITUTION AND REGULATIONS INVOLVED

This case involves the Fifth Amendment of the United States Constitution; and Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955; and Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960. These are reprinted in pertinent part in Appendix B, *infra*.

STATEMENT OF THE CASE

I. THE FACTS UNDERLYING PETITIONERS' CLAIMS.

A. Kreznar's Case.

Prior to January 23, 1956 Stephen L. Kreznar was employed by the Wisconsin Telephone Company, Milwaukee, Wisconsin, as a PBX installer. On January 13, 1956 the Industrial Personnel Security Screening Board (IPSSB) determined that Kreznar's continued clearance for access to classified material was not clearly consistent with the interests of national security and on that day issued a "Statement of Reasons" and a suspension of his clearance in accordance with DOD Directive 5220.6, paragraph 17 e, 20 Fed. Reg. 1535, 32 CFR § 67.4-3 (e). Kreznar was notified of the IPSSB's action by the Director, Office of Industrial Personnel Security Review, (OIPSR) on January 16, 1956, who advised him of his opportunity to respond to the Statement of Reasons.

On or about January 23, 1956, petitioner was discharged from said employment as a direct result of the action of the Department of Defense in suspending his security clearance. Thereafter he made written response to the charges against him and requested a hearing before the New York Industrial Personnel Security Hearing Board. Said hearing was held on May 31, 1956. At this hearing Kreznar was not permitted to confront or cross-examine the informants against him.

On September 7, 1956, Kreznar was informed by the Director, OIPSR, that the New York Industrial Personnel Security Hearing Board had determined that Kreznar's clearance for access to classified information was not clearly consistent with the interests of the national security. Kreznar's appeal to the Industrial

Personnel Security Review Board on September 20, 1956 was denied by the Director, OIPSR, on October 3, 1956, in accordance with DOD Directive 5220.6, para. 21b. On October 5, 1956, Kreznar appealed the adverse determination to the Secretary of Defense who, on November 14, 1956, upheld the actions of his subordinates.

On November 21, 1956 Kreznar filed a complaint in the United States District Court for the District of Columbia (*Kreznar* v. *Wilson, et al.*, Civil Action No. 4487-56), praying for a declaratory judgment that the prior actions revoking his security clearance were invalid, arbitrary, illegal and unconstitutional. An answer was filed on February 4, 1957.

On June 29, 1959 this Court decided *Greene* v. *McElroy*, 360 U.S. 474, holding

> "[t]hat in the absence of implicit authorization from either the President or Congress the respondents (Secretary of Defense and others) were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *id.* at 508.

On July 16, 1959 the Court of Appeals for the District of Columbia decided *Spector* v. *McElroy*, 106 U.S. App. D.C. 51, 269 F. 2d 242. Thereafter, on November 6, 1959, the District Court, relying on the authority of both *Greene* and *Spector*, entered an order declaring the prior actions of the Secretary of Defense and his subordinates in revoking Kreznar's security clearance, to be invalidly authorized and expunged all rulings, orders, directives or determinations predicated upon the invalid agency action.

B. Spector's Case.

Prior to May 10, 1954, Novera Herbert Spector was employed as an Experimental Machinist "A" in Department 5521 of the Sperry Corporation (Sperry) in Great Neck, New York. On May 7, 1954, the Inspector of Navy Material cancelled Spector's security clearance on the ground that his "continued access to Department of Defense classified contracts (Army, Navy and Air Force), [was] not clearly consistent with the best security interest of the United States." On May 10, 1954, and as a direct result of the Navy's action cancelling his clearance, Sperry discharged Spector from employment.

On June 7, 1954, the Screening Division, Eastern Industrial Personnel Security Board (EIPSB) advised Spector that it proposed to deny him consent for employment on classified defense contracts and further advised of his opportunity to respond to the proposed denial action in accordance with the provisions of the Defense Department's Industrial Personnel and Facility Security Clearance Regulation issued May 4, 1953.

On August 23, 1954, and after Spector had submitted a written response, the screening Division denied him clearance. On August 31, 1954, Spector duly appealed the Screening Division's adverse ruling to the EIPSB's Appeal Division, and in connection therewith demanded a bill of particulars in order to intelligently prosecute his appeal. Spector's demand for a bill of particulars was denied on September 3, 1954. On February 7 and 9, 1955, Spector was afforded a "hearing" before the EIPSB's Appeal Division, and on February 15, 1955, was notified that the Appeal Division had affirmed the Screening Division's denial action.

Spector thereupon requested a copy of the hearing transcript, which was not furnished until September 12, 1955. Shortly thereafter, Spector's counsel informed the EIPSB's Executive Secretary that the transcript contained numerous omissions and errors and on October 7, 1955, the EIPSB, on its own motion, ordered a *de novo* hearing. This *de novo* hearing was conducted on October 13, 14, and 24, 1955. On November 21, 1955, the EIPSB's Appeal Division reaffirmed the Screening Division's denial action of August 23, 1954. This decision was sustained by the Industrial Personnel Security Review Board (IPSRB) on June 20, 1956 pursuant to Department of Defense Directive 5220.6 20 Fed. Reg. 1553, issued February 2, 1955, which had superseded the Industrial Personnel and Facility Security Clearance Regulation of May 4, 1953. A further appeal was taken to the Secretary of Defense, who upheld the actions of his subordinates. In none of these proceedings was Spector afforded the opportunity to confront or cross-examine the informants against him.

On November 24, 1956, Spector filed a complaint in the United States District Court for the District of Columbia (*Spector* v. *Wilson, et al.*, Civil Action No. 4514-56), praying for a judgment declaring the prior actions revoking his security clearance to be invalid, arbitrary, illegal, and unconstitutional. An answer was filed on February 8, 1957. Subsequently, on cross-motions for summary judgment an order was entered on November 14, 1957, granting defendants' motion for summary judgment and dismissing Spector's complaint. Spector thereupon appealed to the Court of Appeals.

On July 16, 1959 the Court of Appeals, relying on the authority of *Greene* v. *McElroy, supra,* reversed the judgment of the District Court. 106 U.S. App. D.C. 51, 269 F. 2d 242. On remand, the District Court entered an order on November 6, 1959, declaring the actions of the Secretary of Defense and his subordinates in revoking Spector's security clearance, to be invalidly authorized and expunging all rulings, orders, directives or determinations predicated upon the invalid agency action.

II. PROCEEDINGS IN THE COURT BELOW.

On February 5, 1960 Kreznar and Spector filed separate petitions in the United States Court of Claims seeking monetary restitution for the loss of earnings due to the unauthorized revocation of their security clearance. On September 19, 1960 the United States filed motions to suspend proceedings in the two cases because of the asserted pendency of administrative proceedings within the Department of Defense. The motions relied on Executive Order 10865, 25 Fed. Reg. 1583 issued on February 20, 1960 and the implementing regulation Department of Defense Directive 5220.6, 25 Fed. Reg. 7523 issued July 28, 1960. This regulation was adopted in consequence of the decision in *Greene* v. *McElroy.* It prescribes the standards and procedures for determining whether employees of defense contractors shall have access authorization (security clearance). Parenthetically, neither petitioner is now employed by defense contractors nor do they seek access authorization.

The 1960 regulation, while revising some of the procedures under the 1955 regulation, still permits a determination adverse to the applicant without giving him

the opportunity to confront and cross-examine informants against him. It further provides that decisions prior to its effective date "may be reconsidered * * * after a finding by the appropriate board that there is newly discovered evidence or that other good cause is shown. Authority is also delegated to the director of the office of Industrial Personnel Access Authorization Review to "vacate a previous determination found to have been unauthorized at the time it was made and to take such other steps as may be determined necessary to complete reconsideration of the case." Finally, the regulation provides that "if an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization," and at a later time a final administrative determination is made that the granting to him of such clearance "would be clearly consistent with the national interests," and if it is further determined that the prior denial of clearance "was unjustified", the reimbursement of such loss of earnings may be allowed.

On December 22, 1960 an Order was entered by Commissioner McConnaughey, denying the motion to suspend proceedings and directing the defendant to answer within 30 days. On February 23, 1961 the answer was filed. On March 7, 1961 petitioners filed a joint motion for summary judgment. On September 13, 1961 the Government responded to Kreznar's motion for summary judgment and filed its own alternative motion for summary judgment or to suspend proceedings. On October 9, 1961, a similar paper was filed in Spector's case. Thereafter, oral argument was heard by the Court of Claims on the motions of the respective parties. On June 22, 1962 the court ordered

that further proceedings be suspended. The court filed no opinion, and its Order reads in full as follows:

> "These cases come before the court on plaintiffs' motions for summary judgment and defendant's alternative motions for summary judgment or to suspend proceedings. Upon consideration thereof, together with the opposition thereto, the briefs of the parties and the oral argument of counsel,
>
> IT IS ORDERED that further proceedings, including action with regard to the motions for summary judgment, be and the same are suspended pending plaintiffs' pursuit and completion of the administrative remedies available through the Department of Defense, which proceedings are to be instituted and completed within a reasonable time."

On October 3, 1962 the court overruled petitioners' joint motion for reargument and reconsideration of the decision of June 22. On December 5, 1962 the court overruled petitioners' joint motion for leave to file for rehearing and reconsideration, which motion was based upon the inconsistent decision of the Commissioner in *Greene* v. *United States*. On the same day, the Commissioner, *sua sponte*, reconciled his order in *Greene* to the court's order in *Spector* and *Kreznar*.

REASONS FOR GRANTING THE WRIT

The questions presented and the reasons for granting certiorari are the same herein as in *William L. Greene* v. *United States* in which a Petition for Certiorari is being filed this day. We respectfully request the Court to consider the discussion of the reasons for granting the writ presented in Greene's Petition as the reasons for granting the present petition.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 47-60 — 48-60

STEPHEN L. KREZNAR, NOVERA HERBERT SPECTOR

v.

THE UNITED STATES

Order

These cases come before the court on plaintiffs' motions for summary judgment and defendant's alternative motions for summary judgment or to suspend proceedings. Upon consideration thereof, together with the opposition thereto, the briefs of the parties and the oral argument of counsel,

IT IS ORDERED that further proceedings, including action with regard to the motions for summary judgment, be and the same are suspended pending plaintiffs' pursuit and completion of the administrative remedies available through the Department of Defense, which proceedings are to be instituted and completed within a reasonable time.

BY THE COURT,

MARVIN JONES,
Chief Judge.

Jun 22 1962

APPENDIX B

United States Constitution, Amendment V:

> No person shall be * * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955: * * * par. 26:

> *Monetary Restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960:

> V. *Miscellaneous*
>
> * * * B. *Reconsideration of Prior Decisions* * * *
> 1. Decisions rendered under any industrial personnel review program prior to the effective date of this Regulation which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evi-

dence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

• • •

C. *Monetary Restitution*

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel

review program. Payments under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 888

STEPHEN L. KREZNAR and NOVERA H. SPECTOR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims (Pet. App. A) was entered without opinion.

JURISDICTION

The order of the Court of Claims was entered on June 22, 1962. A timely motion for reargument and reconsideration was denied on October 3, 1962. On December 28, 1962, Mr. Justice Brennan entered

an order extending the time to file the petition for certiorari until March 1, 1963, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether the Court of Claims erred in suspending proceedings in a suit for a money judgment arising out of an adverse determination relating to security clearance, pending pursuit by petitioner of his administrative remedies before the Department of Defense.

REGULATIONS INVOLVED

The pertinent parts of the regulations of the Department of Defense are set forth in the Appendix to the Government's brief in the companion case, *Greene* v. *United States*, No. 887, this Term.

STATEMENT

1. *Petitioner Kreznar.* Prior to 1956, Kreznar was employed by the Wisconsin Telephone Company of Milwaukee, Wisconsin (R. 2). On or about September 1, 1950, that company entered into a "General Contract for Communication Facilities and Services" with the Department of the Army, which was later supplemented by a security agreement (R. 2). The latter agreement (Section I-B) provided that, upon written application of the contractor, the Government would designate employees of the contractor who could have access to classified information.

In September 1954, Wisconsin Telephone sought approval for Kreznar to have access to classified information. Kreznar, at that time, held no clearance and was one of a group of 15 PBX (Private Branch Exchange) Installers for whom the company sought clearance. Prior to that time, his work had not required it.

The application was processed under Department of Defense Directive 5220.6 of February 2, 1955. An initial, non-final determination was made by the Screening Board that he should not be granted access to classified information (R. 1-2). By letter dated June 16, 1956, he was notified that "any existing clearance you may have for access to Army, Navy, or Air Force classified defense information has been suspended" (R. 1-2). This letter also set forth the reasons why access was not being granted to him and advised him of his right to a hearing.

Kreznar requested and received a hearing before the New York Industrial Personnel Security Hearing Board (R. 2). After considering the case, the Board found that the allegations of the Screening Board were meritorious and ruled that the granting to plaintiff of access to classified information was not clearly consistent with the interests of national security (R. 2). By letter dated September 7, 1956, Kreznar was so notified. Upon review, this action was affirmed (R. 2).

On or about November 21, 1956, plaintiff filed an action in the United States District Court for the District of Columbia, seeking a declaratory judgment that the denial of his security clearance was in-

valid (R. 2-3). On November 6, 1959, following the decision of this Court in *Greene* v. *McElroy*, 360 U.S. 474, the district court entered an order vacating the action of the New York Industrial Personnel Security Hearing Board and orders based thereon (R. 3).

By letter dated November 6, 1959, Kreznar made a generalized "demand" for monetary restitution under paragraph 26 of the 1955 regulation (R. 3). By letter dated November 19, 1959, he was advised, in substance, that action on the matter would have to await resolution of certain questions raised by the decision in the *Greene* case, *supra*.

2. *Petitioner Spector.* As of May 1954, Spector was employed as a machinist by the Sperry Gyroscope Company, a division of The Sperry Corporation (R. 15). The Government and Sperry had a Security Agreement identical to that applicable to Kreznar's employment. On May 7, 1954, Spector and Sperry were notified by the Inspector of Naval Materials, New York, that Spector was to be denied access to classified material, pending a decision by the Eastern Industrial Personnel Security Board (EIPSB) as to whether he should be granted access (R. 16). These letters expressly stated that this action did not preclude Spector's employment by Sperry. The applicable regulation contained similar provision.

On June 7, 1954, the Screening Division, EIPSB, notified Spector that it proposed to revoke his authorization for access to classified material, setting forth

the reasons for this action and advising him of his right to reply in writing thereto (R. 16). After Spector replied, the Screening Division on August 13, 1954, notified him that clearance for access to classified information was revoked. (R. 16). It further advised him of his right to appeal to the Appeal Division of the EIPSB and to a hearing.

Spector appealed and several hearings were held during 1955 (R. 16-17). On November 21, 1955, Spector was notified that the Appeal Division had considered his case and decided that the granting of access to classified information was not clearly consistent with the national interest (R. 17).

Spector requested review of the Board's decision. By letter dated June 20, 1956, he was advised that the decision had been reviewed by the Industrial Personnel Security Review Board and that it had sustained the prior decision (R. 17). Spector sought further review of his case and by letter dated November 20, 1956, was notified that the matter had again been examined and that the Secretary of Defense had found no basis for departing from the decision reached by the Review Board (R. 17, 26).

On November 24, 1956, Spector filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief (R. 17). After the filing of cross-motions for summary judgment, an order was entered on November 14, 1957, dismissing the complaint (R. 17). On July 16, 1959, the court of appeals in *Spector* v. *McElroy*, 269 F. 2d 242, reversed the judgment of the district

court, relying on *Greene* v. *McElroy*, *supra* (R. 17-18). The litigation was ultimately terminated by an order of the district court entered on November 6, 1959, by consent of the parties (R. 18). This order set aside the action of the Appeal Division of the Eastern Industrial Personnel Security Board and the Industrial Personnel Security Review Board and all orders based thereon (R. 18).

By letter dated November 6, 1959, Spector made a generalized "demand" for monetary restitution under paragraph 26 of the 1955 regulation (R. 18). By letter dated November 19, 1959, he was advised, in substance, that action on the matter could not be completed at that time, pending resolution of certain questions raised by the decision in the *Greene* case, *supra*.

3. *Proceedings in the Court of Claims.* On February 5, 1960, Kreznar and Spector filed separate petitions in the Court of Claims, seeking money damages arising out of the denial (Kreznar) and revocation (Spector) of their security clearances (R. 1, 15). On February 19, the Government filed motions to suspend consideration of petitioners' claims because of the petitioners' failure to pursue available administrative remedies before the Department of Defense. The motion was based upon letters which had been sent to petitioners by the Department of Defense on September 9, 1960. Petitioners were advised therein that under the authority of Executive Order 10865, 25 Fed. Reg. 1583, dated February 20, 1960, and the Industrial Personnel Access Authorization Review Regulation, 25 Fed. Reg. 7523, dated July

28, 1960, copies of which were attached to the letters, their cases would be processed to completion by the Department of Defense. Petitioners were further advised that when a final determination as to access authorization had been made, their claims for monetary restitution could be acted upon.

The government's motion was denied, and the government was directed to answer the petitions (R. 191). After the answers had been filed (R. 9, 23), petitioners, on March 7, 1961, filed a joint motion for summary judgment (R. 29). The government responded in both cases with alternative motions for summary judgment or suspension of proceedings (R. 82, 140). After oral argument, the Court of Claims ordered that further proceedings be suspended "pending plaintiff's pursuit and completion of administrative remedies available through the Department of Defense * * *." (R. 183). On October 3, 1962, the court below denied petitioner's joint motion for reargument and reconsideration (R. 187), and on December 5, 1962, it also denied petitioner's joint motion for leave to file for rehearing and reconsideration (R. 198).

ARGUMENT

The petition raises the same issues presented in the petition for a writ of certiorari in *Greene* v. *United States*, No. 887, October Term, 1962. Indeed, the petition is based exclusively upon the considerations set forth in the *Greene* petition. For

the reasons developed in our brief in opposition in *Greene*, this petition should likewise be denied.

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April, 1963.

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